



U.S. Department of Justice

Office of the Inspector General

November 29, 2018

The Honorable Trey Gowdy
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
2471 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman and Ranking Member Cummings:

I write to express my strong support for H.R. 3154, the “Inspector General Access Act of 2017” (Access Act), which your Committee approved unanimously on September 27, 2018. The Access Act would amend the Inspector General Act (IG Act) to provide the Department of Justice (DOJ) Office of the Inspector General (OIG) with authority to investigate allegations of misconduct against DOJ attorneys for their actions as lawyers, just as the OIG has authority under the IG Act to investigate allegations of misconduct made against any non-lawyer in the Department, including law enforcement agents at the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and the U.S. Marshals Service (USMS). Currently, under Section 8E of the Inspector General Act, the OIG does not have the authority to investigate allegations of misconduct made against DOJ attorneys acting in their capacity as lawyers; this role is reserved exclusively for the Department’s Office of Professional Responsibility (OPR).

The Access Act has received broad, bipartisan support over successive Congresses because it promotes independent oversight, transparency, and accountability within DOJ and for all of its employees. For these same reasons, in 1994, the then-*General Accounting Office*, now the Government Accountability Office (GAO), issued a report that found that preventing the OIG from investigating attorney misconduct was inconsistent with the independence and accountability that Congress envisioned under the IG Act.

The OIG has long questioned this carve-out because OPR lacks statutory independence and does not regularly release its reports and conclusions to the public. Moreover, to our knowledge, the DOJ Inspector General is the only Inspector General in the entire federal government that does not have the authority to investigate alleged professional misconduct by attorneys who work in the agency it oversees. Providing the OIG with authority to exercise jurisdiction in attorney professional misconduct cases would enhance the public's confidence in the outcomes of these investigations and provide the OIG with the same authority as every other Inspector General.

Alleged professional misconduct by DOJ prosecutors, like any alleged misconduct by DOJ agents, should be subject to statutorily independent oversight.

Over fifteen years ago, the Department and Congress recognized the importance of statutorily independent OIG oversight over all DOJ law enforcement components (FBI, DEA, USMS, and ATF) when Attorney General Ashcroft authorized the OIG to conduct additional law enforcement oversight in 2001 and Congress legislated it in 2002. Yet, allegations against Department prosecutors for professional misconduct continue to be handled exclusively by OPR. As a result, presently, if an allegation of misconduct is made against the FBI Director, it is reviewed by the OIG; by contrast, if an allegation of professional misconduct is made against the Attorney General, it is handled by OPR, a Departmental component that the Attorney General supervises.

The rationale supporting independent oversight for alleged misconduct by law enforcement applies with equal force to alleged wrongdoing by federal prosecutors, regardless of the nature of the alleged misconduct. There is no principled reason to have two standards of oversight at DOJ – one for federal agents, who are subject to statutorily independent and transparent oversight by the OIG, and one for federal prosecutors, who are not for allegations of professional misconduct. This is particularly true given the extraordinary power that Department lawyers have to charge individuals with crimes, to seek incarceration, and to pursue the seizure of assets and property.

The OIG's independence, established by statutory authorities and protections, facilitates objective and credible investigations of misconduct allegations, as well as unbiased reports that identify and make useful recommendations for improving the Department. The OIG is headed by a Senate-confirmed Inspector General who can only be removed by the President, with prior notice to Congress. The OIG's statutory independence is bolstered by the OIG's dual obligation to report findings and concerns both to the Attorney General and to Congress. The independent OIG is able to make critical investigative and audit findings without fear of reprisal.

Conversely, OPR has no statutory independence or protections. The OPR Counsel is appointed by and answers to the Attorney General, and can be removed or disciplined by the Attorney General. Although a November 27, 2018 letter from DOJ's Office of Legislative Affairs (OLA) on H.R. 3154 states that "OPR has always acted independently," it does not point to any protections, statutory or otherwise, that exist to ensure OPR's independence from the Attorney General, nor has DOJ proposed strengthening OPR's independence by adding such protections. Indeed, the letter fails to explain or even address why DOJ believes it is better to have a non-statutorily independent entity handle attorney professional misconduct cases rather than a statutorily independent organization, as is the case for law enforcement professional misconduct allegations.

The OIG's independent and transparent oversight enhances the public's confidence in the DOJ's programs and improves its operations.

In addition to independence, the OIG considers transparency a crucial component of its oversight mission. With limited exceptions, the OIG ensures that the public is aware of the results of our work. The majority of our reports are posted on our public website at the time of release to ensure that Congress and the public are informed of our findings, in a comprehensive and timely manner. The OIG, consistent with the IG Act, publishes on our website summaries of investigations resulting in findings of administrative misconduct by senior government employees and in matters of public interest even when the subject is not prosecuted. We post such summaries without identifying the investigative subject consistent with the legal requirements under the Privacy Act. Because of this commitment to transparency, there are currently hundreds of OIG reports, audits, and reviews posted on our web site. There are also summaries of dozens of OIG investigative reports posted, including recent reports involving significant misconduct by senior DOJ officials.

In contrast, there are currently only a total of five reports (other than annual reports) posted on [OPR's website](#). Four of those five reports are from 2008 and were the result of OPR's joint work with the OIG, and which the OIG posted on our website consistent with the IG Act and our practice. The fifth report was completed by OPR in 2013 and only released in 2015 in response to a Freedom of Information Act (FOIA) request. Moreover, although the OLA letter states that "OPR discloses a substantial amount of information about its work and findings in its annual report," this information is not reported in a timely or comprehensive manner. Congress and the public only find out about some, but not necessarily all, of OPR's work when it issues an annual report.

An example of this dichotomy can be found in a case involving an Oregon lawyer who was arrested by the FBI and wrongly imprisoned after mismatched fingerprints linked him to the 2004 bombing at a Madrid train station. The OIG investigated the allegations of FBI agent misconduct, while the Department's

OPR investigated the allegations of attorney misconduct. This bifurcation led to inconsistent treatment. The OIG report on the actions of the FBI agents was published on the OIG's website, but OPR did not publish the report on the conduct of the DOJ attorneys who were involved in the same case.

Transparency ensures greater accountability, and sends an important deterrent message to other Department employees. The credibility of the Department's disciplinary process is inevitably reduced when the responsible component operates under the direction of the Department's senior leadership and is not subject to public scrutiny because of limited transparency.

The OIG has demonstrated its excellence in reviewing complex legal and factual issues, including employee ethics and misconduct matters.

Over the past 30 years, the OIG has shown that it is capable of fair and independent oversight of the DOJ. The jurisdictional limitation of Section 8E(b)(3) is an unnecessary historical vestige of the fact that OPR was in existence prior to the statutory creation of the OIG in 1988. Those who unsuccessfully tried in 2002 to forestall Congress from providing the OIG with oversight of alleged misconduct by FBI and DEA agents contended that those cases required specialized expertise – just like the Department argues currently that prosecutorial oversight requires specialized expertise – and that argument was roundly rejected and has proven to be entirely without merit. The decision by Congress to extend OIG jurisdiction in 2002 to encompass misconduct by FBI and DEA agents has allowed for significant and important oversight of DOJ's law enforcement operations, and has had significant positive impact on the integrity of those agencies' operations.

The OIG has consistently demonstrated our ability to handle complex legal and factual issues related to our misconduct reviews, including those involving FBI and DEA agents as well as, on occasion, ethics issues involving DOJ lawyers. In addition to our recent investigation of the FBI's actions prior to the 2016 presidential election, which involved evaluating the professional conduct by FBI agents, FBI lawyers, and FBI senior officials, we have investigated the FBI's actions involving its former agent Robert Hanssen, the FBI's activities related to James "Whitey" Bulger, the DEA's oversight of its confidential informant program, the DEA and other components' handling of sexual misconduct and harassment cases, the operation of the FBI laboratory, ATF's actions involving Operation Fast and Furious, and the FBI's use of its national security authorities (National Security Letters, Patriot Act Section 215, FISA Amendment Act Section 702).

Each of those and many other reviews resulted in independent and transparent findings by the OIG, and resulted in changes to Department operations that enhanced their effectiveness and thereby increased the public's confidence in those programs. Moreover, OIGs throughout the government,

including at the Department of Homeland Security and the Securities and Exchange Commission, have authority to investigate misconduct allegations made against attorneys at those agencies and they have demonstrated that they are fully capable of dealing with such matters covering a wide range of complex legal issues. The DOJ OIG is the only OIG, to our knowledge, that is barred by the IG Act from reviewing misconduct by lawyers within the agency it oversees.

The Access Act would provide the OIG with oversight over Department lawyers in a manner that is entirely consistent with its oversight authority over Department non-attorneys.

The present oversight system that applies to allegations made against any DOJ non-lawyer, as provided for in the IG Act and Department regulations, is precisely the oversight mechanism that the Access Act seeks to apply to Department lawyers. Specifically, under the current system for DOJ non-lawyers, all non-frivolous misconduct allegations must be provided to the OIG for the OIG's review and determination as to whether it is of the type and nature that warrants and necessitates independent OIG investigation. Given the OIG's limited resources, the OIG handles only those allegations that warrant an independent OIG investigation, and therefore the OIG returns routine and less serious misconduct allegations to Department components, such as the FBI's Inspections Division and the DEA's OPR, for their handling and investigation. For those matters that the OIG retains, when the OIG completes its investigation, it sends its report to the component so that it can adjudicate the OIG's findings and take disciplinary action, as appropriate. The Access Act creates a similar practice, by maintaining the Department's OPR to handle misconduct allegations that do not require independent outside review as determined by the OIG, much as the internal affairs offices at the FBI, DEA, ATF, and USMS remain in place today.

We are unaware of any claims by Department leaders that this approach has resulted in "different investigative standards," "decrease[d] efficiency," or "inconsistent application" of legal standards. There is no evidence that it has impacted the components "ability to successfully defend any significant discipline decision before the Merit Systems Protection Board." Yet this parade of horrors is precisely what the OLA letter claims will occur if attorneys are treated in the same manner as Special Agents and non-attorneys at the Department, rather than continuing to receive the special oversight treatment granted to them under the current carve-out provision under the IG Act. This argument is meritless. Indeed, the disciplinary processes at the FBI and the DEA have substantially improved since the OIG obtained statutory oversight authority over those components in 2002, in significant part due to the greater transparency and accountability that has resulted from the OIG's oversight.

I very much appreciate your strong support for my Office and for Inspectors General throughout the federal government. If you have further

questions, please feel free to contact me or Adam Miles, Counselor to the Inspector General, at (202) 514-3435.

Sincerely,



Michael E. Horowitz
Inspector General

cc: The Honorable Charles Grassley
Chairman, Senate Judiciary Committee
Co-Sponsor, S. 3003

The Honorable Dianne Feinstein
Ranking Member, Senate Judiciary Committee

The Honorable Bob Goodlatte
Chairman, House Judiciary Committee

The Honorable Jerrold Nadler
Ranking Member, House Judiciary Committee

The Honorable Ron Johnson
Chairman, Senate Committee on Homeland Security and Governmental Affairs

The Honorable Claire McCaskill
Ranking Member, Senate Committee on Homeland Security and Governmental Affairs

The Honorable Cedric Richmond
Sponsor, H.R. 3154

The Honorable Jody Hice
Co-Sponsor, H.R. 3154

The Honorable Stephen Lynch
Co-Sponsor, H.R. 3154

The Honorable Mike Lee
Sponsor, S. 3003

The Honorable Lisa Murkowski
Co-Sponsor, S. 3003